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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 251

LEON GRADSKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

LEON GRADSKY,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Leon Gradsky, petitioner herein, by and through his undersigned attorney, and respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of March, 1965, and the order of the same Court on the 9th day of April, 1965, denying Petition for Rehearing.

OPINION OF THE COURT BELOW

The judgment of the District Court for the Southern District of Florida was entered on April 17, 1963.

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 11, 1965, and is annexed hereto as Appendix A.

The opinion of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court is reported at *342 Fed. 2d 426*, and is annexed hereto as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its opinion on March 11, 1965, Appendix B.

An order was entered denying the Petition for Rehearing on April 9, 1965, Appendix C. An order extending the time for filing Petition for Writ of Certiorari was entered on May 7, 1965, extending the time for filing until June 14, 1965.

Jurisdiction of this Court is invoked under *28 U. S. C. Sec. 1254 (1)*, and the provisions of Rule 19 of the Rules of the Supreme Court of the United States as amended April 12, 1954, and effective July 1, 1954.

QUESTIONS PRESENTED

I.

DOES THE PLAIN ERROR RULE REQUIRE A REVIEW OF THE TRIAL COURT'S FAILURE TO GIVE A LIMITING INSTRUCTION REGARDING AN EXTRAJUDICIAL STATEMENT PREJUDICIAL TO THE PETITIONER THAT WAS MADE BY A CO-CONSPIRATOR TWO YEARS AFTER THE TERMINATION OF THE CONSPIRACY.

II.

WHETHER THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH ITS OWN HOLDINGS, WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL HOLDING THAT GUILT MUST BE ESTABLISHED IN CIRCUMSTANTIAL EVIDENCE CASES BY EVIDENCE EXCLUDING EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

III.

WHETHER THE COURT OF APPEALS UNDER THE PLAIN ERROR RULE SHOULD HAVE CONSIDERED THE TRIAL COURT'S ERROR IN ADMITTING TESTIMONY THAT A WITNESS HAD BEEN ADVISED AT TRIAL BY THE PETITIONER TO "TAKE THE FIFTH" ALLOWED THE JURY TO CONSIDER EVIDENCE UNRELATED TO THE TRIAL ISSUES WHICH COULD ONLY SERVE TO PREJUDICE PETITIONER BY INFERRING AN ADMISSION OF GUILT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional Provisions, Statutes and Rules are involved in this Petition for Writ of Certiorari.

Constitution of the United States–Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18–Federal Rules of Criminal Procedure.

Rule 14. Relief from Prejudicial Joinder

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 52. Harmless Error and Plain Error.

> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Title 28, Revised Rules of the Supreme Court of the United States.

Rule 19. Considerations governing review on certiorari.

> 1 (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important

state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Title 15—United States Code

Sec. 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18—United States Code

Sec. 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Sec. 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 1939, Sec. 34, 63 Stat. 94.

STATEMENT OF THE CASE

Petitioner was accused jointly with his brother and other co-defendants of violating the Anti-Fraud provisions of the Securities Act of 1933; the Mail Fraud Statute and the Conspiracy Statute. The indictment contained five counts charging violations of Title 15, United States Code, Section 77 q (a); five counts charging violation of Title 18, United States Code, Section 1341, and one count charging conspiracy in violation of Title 18, United States Code Section 371.

After a trial before a jury, a judgment of conviction was returned on April 17, 1963, on all but counts Two and Nine of the indictment. Petitioner was sentenced to imprisonment for five years on each of counts 1, 3, 4 and 5, to run concurrently. On counts 6, 7, 8 and 10, sentence was suspended and Petitioner was placed on probation. A concurrent three year sentence was imposed on count 11.

An appeal was prosecuted to the United States Court of Appeals for the Fifth Circuit and the opinion of that Court affirming the conviction was issued on March 11, 1965. (APP B). A Petition for Rehearing was filed by the Petitioner on April 1st, 1965; and was denied without opinion on April 15, 1965. (APP. C)

The facts disclosed by the record and the opinion of the Court of Appeals demonstrated that Petitioner had been employed as a manager of a corporation known as Inter-City Finance Corp., which sold interest bearing securities to the public.

Petitioner's brother, Norman Gradsky, was shown to have been the sole owner of a separate corporation known as National Auto Brokers. The evidence disclosed that fictitious automobile accounts were sold by National Auto Brokers through the Miracle Loan Company to Inter-City Finance Corporation. This latter corporation in turn sold its high-interest bearing notes to the public based upon representations of the amount and nature of the collateral securing these obligations. A portion of the proceeds from the sale of the notes were then allegedly distributed to the Petitioner directly from

Inter-City Finance Corporation in the form of salaries and loans, as well as through a corporation known as L. G. Enterprises and checks drawn to a "Leon Herman".

Inter-City Finance Corporation was acquired by Ray Eizenman on October 9, 1958. She became the sole stockholder and president of the company on that date. Norman Herman, the husband of Ray Eizenman, was employed by Inter-City and held the office of vice-president.

Previously, Ray Eizenman had been associated with Bernard Marcus who served as secretary of Inter-City Finance Corporation. Mr. Marcus was an attorney who had participated in mortgage activities with Miss Eizenman and whose services included the formation of the Miracle Loan Company on or about May 1, 1958. Under Ray Eizenman, Miracle Loan Company became a subsidiary of Inter-City Finance Corporation.

In Inter-City Finance Corporation Petitioner supervised employees, retained and supervised accountants, and in one case spoke to a prospective investor. In the course of this solicitation, representations were made regarding the collateral position of Inter-City Finance Corporation. In addition, it was determined at trial that preparation of newspaper advertisements and form letters prepared on behalf of Inter-City Finance Corporation were executed at the behest of the Petitioner.

No direct proof was offered that the Petitioner had knowledge of either the falsity of the claims made in the advertisements issued, or the form letters mailed to investors responding to advertisements. Neither the testimony of Norman Herman, a co-conspirator, nor testimony of Harry Hicks, who created the fictitious accounts of National Auto Brokers, implicated the Appellant in the scheme alleged.

Mr. George Callahan, accountant for the Securities & Exchange Commission, testified that the Petitioner was employed by Inter-City Finance Corporation only until November 7, 1958. In the course of his testimony, Mr. Callahan related a conversation with an alleged co-conspirator that took place

in June of 1961, two years subsequent to the last date charged in the indictment. At that time the co-conspirator, Norman Gradsky, stated to Mr. Callahan that Leon Gradsky and "Leon Herman" were one and the same persons. There was no other testimony concerning that matter.

Mr. Callahan also testified that cancelled checks of National Auto Brokers showed that disbursements were made by that company to Leon Gradsky, "Leon Herman" and L. G. Enterprises, Inc. No direct testimony connected Leon Gradsky with L. G. Enterprises, Inc.

The Government contended that the Petitioner received payments from Inter-City Finance Corporation and its subsidiaries in the form of loans and salaries in the amount of $21,000.00. It was further alleged that the Petitioner received approximately $47,000.00 from National Auto Brokers during the period that National Auto Brokers was furnishing fictitious finance paper to Inter-City Finance Corporation through the Miracle Loan Company.

Of the latter amount allegedly received by Petitioner, only a single check was payable to him in the amount of $1,200.00. The remaining balance was paid to the Inter-City Acceptance Corporation ($13,640.00); and to the corporate entity, L. G. Enterprises ($20,340.00). "Leon Herman" received $11,801.11.

During his testimony, Harry Hicks, an employee of National Auto Brokers, stated that the Petitioner had advised him in the hallway of the Courthouse to "take the Fifth". This was a comment allegedly made by the Petitioner to the witness Hicks during a trial recess.

No objection was made at the trial level to either of the events related by Mr. Callahan or Mr. Hicks. These problems were briefed and argued before the Court of Appeals for the Fifth Circuit, (Norman Gradsky brief, Appendix D. , , ; Leon Gradsky brief, Appendix D. , , ; Government Brief, Appendix D. , ,).

REASONS FOR GRANTING THE WRIT

This Court has been particularly sensitive to the dangers of prejudice and deprivation of a fair trial caused by post-conspiratorial hearsay statements implicating another co-conspirator when unaccompanied by a proper cautionary instruction. *Delli Paoli* v. *U. S. 352 U. S. 232 (1957); Fiswick* v. *U. S. 329 U. S. 211 (1946); Krulewitch* v. *U. S. 336 U. S. 440 (1949); Wong Sun* v. *U. S. 371 U. S. 471 (1963).*

In this instance the statement made to the witness Callahan by the co-conspirator, Norman Gradsky, placed on the trial record the fact that the Petitioner received monies from the alleged conspiracy under the name of "Leon Herman". The amount received under this purported alias was approximately one-third of the total realized through National Auto Brokers. It was an integral segment of proof demonstrating the involvement of the Petitioner in the scheme. Rather than being 'merely corroborative' and 'largely cumulative' of uncontradicted evidence of guilt, there was in this instance, no other evidence in this regard against the Petitioner. *(cf. Delli Paoli, Supra, 352 U. S. at 242).*

In the case of Norman Gradsky, George Levine, et al, Appellants, v. U. S. A., Appellee, the United States Court of Appeals for the Fifth Circuit, stated that the Government expert, the accountant Callahan, submitted summaries and charts in that case which were among the Government's most telling evidence.[1/]

In this case also, the witness Callahan presented evidence for the Government which was among the most telling in its effect upon the Petitioner.

Unlike the *Delli Paoli* situation, the introduction of this testimony was admitted in the midst of trial and was inseparable from other testimony, thereby inhibiting the jury's ability to separate this information from other testimony. *(cf. Delli Paoli 352 U. S. at 241-2).*

1/ See page 15, Petition for Writ of Certiorari of Norman Gradsky, Petitioner v. U. S. A.

Most importantly, under these circumstances, where obtaining the proceeds of an allegedly conspiratorial scheme would serve to confirm the Government's charges, greater scrutiny must be given to the protection of the rights of this Petitioner.

As indicated, no objection was made to the introduction of this testimony on the trial level. However, concerted effort was made in all briefs submitted to the Circuit Court requesting the Appellate Tribunal to consider the matter. This consideration becomes particularly important here, where absent trial objection, the Court itself failed to give any instruction to the jury confining the use and purpose of such testimony in their deliberations.

As the dissenting Justices stated in *Delli Paoli, Supra, 352 U. S. 232, 247-8:*

> "It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him . . . it is not for an Appellate Tribunal to know how the jury's mind would have operated if powerfully improper evidence had not in effect been put in the scale against petitioner."

The foregoing rationale has impelled other courts, both before and after *Delli Paoli* to reverse convictions because of the potential prejudicial effect of post-conspiratorial hearsay. (See eg. *Schaffer* v. *U. S.* 221 *Fed. 2d* 17 (*5th Cir.* 1955); *Barton* v. *U. S.* 263 *Fed. 2d* 894 (*5th Cir.* 1959); *Abbate* v. *U. S.* 247 *Fed. 2d* 410. (*5th Cir.* 1957); *Mora* v. *U. S.* 190 *Fed. 2d* 749 (*5th Cir.* 1951); *U. S.* v. *Jacangello* 281 *Fed. 2d* 574 *3rd Cir.* 1960); *U. S.* v. *Gordon* 253 *Fed. 2d* 177 (*7th Cir.* 1958); *Tripp* v. *U. S.* 295 *Fed. 2d* 418 (*10th Cir.* 1961); *Kramer* v. *U. S.* 317 *Fed. 2d* 114 (*D. C. Cir.* 1963); *U. S.* v. *Sansone* 206 *Fed. 2d* 86 (*2d Cir.* 1953).

Wholly apart from *Delli Paoli,* the hearsay statement should have been excluded under other elementary rules of evidence. In this situation, cumulative evidence competent as to one Defendant, should be excluded when its probative value is

counter-balanced by its unfair and prejudicial effect upon those against whom it is not competent. *U. S.* v. *Kahaner* 203 *Fed. Supp.* 78 (*S. D. N. Y.* 1962). To the same effect, see *Uniform Rules of Evidence* 45; *Model Code of Evidence Rule* 303 (1942); *McCormick, Evidence* 319 (1954); 2 *Wharton, Criminal Evidence and Procedure Sec.* 673 *at* 612, (*Twelfth Ed.* 1955); 6 *Wigmore Evidence Sec.* 1864 *at* 491 (*Third Ed.* 1940).

The admission of the objectionable hearsay clearly constituted substantial error of the type and character almost anticipated by *Rule* 52 (*b*) *of the Federal Rules of Criminal Procedure.* It requires, in this instance, the invocation of that rule by the Appellate Court in granting to the Petitioner suitable relief from the erroneous admission of the declaration and the failure to deliver a limiting charge as to its use. *U. S.* v. *Gordon* 253 *Fed.* 2*d* 177, 183 (7*th Cir.* 1958); *Kotteakos* v. *U. S.* 328 *U. S.* 750, 764-5 (1956); *Fiswick* v. *U. S.* 329 *U. S.* 211, 218 (1946); *Krulewitch* v. *U. S.* 336 *U. S.* 440, 444-5; *Wong Sun* v. *U. S.* 371 *U. S.* 471, 492-3 (1963).

In the circumstances of this case it was error not to inform the jury that the hearsay was admissible solely against the declarant to demonstrate his consciousness of guilt, and to allow the jury to consider the testimony for any other purpose without a clear statement of the limited reasons for which it was admitted. *Compare Lutwak* v. *U. S.* 334 *U. S.* 604, 619 (1953).

The testimony showed that the creation of fictitious paper and collateral forgeries by the witness Harry Hicks was accomplished with the aid of a co-conspirator, not the Petitioner.

No direct evidence connected Petitioner with knowledge or participation in that scheme which formed the primary basis for the opinion of the Court of Appeals, for the Fifth Circuit. (APP B).

Similarly, in proving the methods of payment to the Petitioner, it was demonstrated that monies were distributed to L. G. Enterprises, Inc., and "Leon Herman", an alleged alias used by the Petitioner. Thus both the conception of the con-

spiracy and the manner in which this Petitioner was alleged to have received funds was based upon circumstantial proof.

In its charge to the jury the Court dealt with the problem of establishing guilt beyond a reasonable doubt.

The adequacy of this charge aside, under the circumstances of this case it was incumbent upon the trial Court to charge with regard to the burden of proof sufficient to justify the finding of guilt in circumstantial evidence cases.

As stated in *Riggs* v. *U. S.* (*5th Cir.* 1960) 280 *Fed. 2d* 949 *at* 955:

> "The position of the Fifth Circuit becomes even clearer when we consider that, as a practical aid to its review of the sufficiency of the evidence to justify a finding of guilt beyond a reasonable doubt in circumstantial evidence cases, ' * * * this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt, and equally without wavering has applied it.' Panci v. United States, 1958, 256 F 2d 308, 312."

In the present case the only reference made to this theory was at Page 739 of the Transcript in which the Court stated:

> "Finally, the Government has the burden of proving its case, not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence.
>
> In other words, proving it beyond a reasonable doubt, and I have already instructed you in some detail as to what that proof consists of." (APP).

It is therefore clear that while the Court recited the words, it failed to distinguish "every reasonable hypothesis except that of guilt", as the test in determining reasonable doubt in circumstantial evidence cases. Instead it allowed this case to go to the jury without the crucial protection afforded by Fifth Circuit precedent, by equating both concepts as equal.

The holding, as indicated in *Riggs* supra, is in conflict with the settled authority in the Fifth Circuit, the authority in the Third, Eighth, Ninth, Tenth and District of Columbia Circuits and with the conclusion of this Court in *Mortensen* v. *U. S.* 322 *U. S.* 369 (1944), and *American Tobacco Company* v. *U. S.* 328 *U. S.* 781 (1946).

In this case no charges were submitted for the Court's consideration, nor was objection made to the charge of the Court in this regard.

Applying the foregoing principle of law to the case at bar, an analysis of the opinion of the United States Court of Appeals in this case, (APP B), indicates a recognition of direct evidence as the foundation for the judgment against Norman Gradsky, as compared with the recognition that the judgment against Petitioner was predicated upon circumstantial evidence. The charge therefore should have included the distinction of the burden necessary to prove the case against Norman Gradsky as distinguished from the burden necessary to prove the case built on circumstantial evidence against the Petitioner.

The witness, Harry Hicks, admitted participation in the preparation of fraudulent automobile accounts for National Auto Brokers which were sold to Miracle Loan Company.

During his testimony, Hicks was permitted to state that the Petitioner told him during a trial recess, in the Courthouse lobby, to "take the Fifth" when called to testify.

In relating this incident, it is clear that such testimony had no direct bearing on the issues being presented to the jury, namely, a conspiracy to defraud by the use of the mails. Rather, the testimony was obviously offered as an admission of guilt by the Petitioner.

The statement by Hicks describing the incident in the lobby was objectionable:

First, as a post-conspiratorial statement allegedly made by a co-conspirator;

Secondly, since it is unrelated to the particular conspiracy charged and if relevant at all, is evidence of a separate conspiracy to conceal similar to that discussed in *Grunewald* v. *U. S.*, 353 *U. S.* 391 (1957); and

Thirdly, because any use of the Fifth Amendment, as here, is equated with an admission of guilt. In effect, it forces the Petitioner to the stand in an effort to refute this testimony, in violation of his Fifth Amendment privilege.

In the context used here, the probative value of such testimony to the prosecution, must be weighed against the serious prejudicial effect of its unlimited admission, against the petitioner. This is particularly pertinent here, where trial counsel failed to object to the admission of this testimony, and the trial court allowed its admission without limiting instructions as to its use.

In this posture, the problem was presented to the Circuit Court of Appeals which, as indicated, refused to review the question under the Plain Error Rule. (Federal Rules of Criminal Procedure, Rule 52 b). (See APP B).

The trial court permitted the jury to use testimony only relating to a continuing conspiracy to conceal. That testimony, as admitted, was tantamount to an admission of guilt of the issues on trial.

The Plain Error Rule was appropriate and applicable in these circumstances, and the failure to exercise this power below, was error.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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Miami Beach, Florida.
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1964

LEON GRADSKY and NORMAN GRADSKY,	:	
	:	
Appellant,	:	
	:	
versus	:	
	:	No. 20632
	:	
UNITED STATES OF AMERICA,	:	
	:	
Appellee.	:	
	:	

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by Counsel;

On consideration whereof, it is now here ordered and adjudged by this court that the judgments of said District Court in this cause be, and the same hereby are affirmed.

March 11, 1965.

Issued as Mandate

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20632

LEON GRADSKY and NORMAN GRADSKY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM: The principal basis for the appeals of these separate appellants is the contention that the government failed to prove a single conspiracy in which the two brothers were conspirators, and that thus the testimony as to the declarations of the one were improperly considered by the jury as binding on the other. Norman Gradsky practically concedes

on this appeal, as is fully warranted by the record, that he was guilty of a fraudulent scheme in the setting up of National Auto Brokers, which created fictitious automobile accounts which it sold through Miracle Loan Company to Intercity Finance Company, of which Leon Gradsky was manager. He says that there was no proof that his brother, Leon, knew of the fictitious nature of the automobile paper which Intercity Finance Company represented to its "investors" secured their loans to the company. We conclude that the glaring falsity of the representations made by Intercity as to the nature of the investment it was then offering to the public warrants a finding by the jury that there was full knowledge by the general manager of Intercity of the facts which caused these representations by him to be false. There was sufficient nexus between the corporation primarily operated by Norman and that operated by Leon to warrant submission to the jury of the question whether both brothers were consciously engaged in the same fraudulent scheme.

None of the legal points raised by appellants here may be noted because no motion touching on them was made in the trial court. None of them is of such a nature that substantial justice requires this Court's taking cognizance of them under the plain error rule.

The judgments are AFFIRMED.

APPENDIX C

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

April 15, 1965

APR 19 REC'D

Re: No. 20632 - Leon Gradsky and Norman Gradsky
-vs- United States of America.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

Edward W. Wadsworth

EDWARD W. WADSWORTH,
Clerk

Messrs. Claude L. Eichel
and E. David Rosen
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Mr. Milton E. Grusmark
Attorney at Law
Miami Beach, Fla.

Mr. Lloyd G. Bates, Jr.
Assistant U. S. Attorney
Miami 1, Fla.

*As to Leon Gradsky

APPENDIX D

EXCERPTS FROM THE BRIEF OF LEON GRADSKY PAGES 11 and 21.

Mr. Callahan's testimony, however, did seek to involve Leon Gradsky by attempting to establish that Leon Gradsky was involved through use of other names. This testimony was clearly prejudicial and inadmissible. Mr. Callahan stated that he had been told by Norman Gradsky in June of 1961 (two years subsequent to the last date charged in the indictment) that Leon Gradsky and Leon Herman were one and the same (T. 667). Surely that testimony should never have been considered by the jury in the case at bar.

* * * * * * *

POINTS IV and V of this brief are argued in the brief submitted by Norman Gradsky. Appellant hereby adopts said respective arguments, and incorporates them herein to be made a part hereof, in order to avoid unnecessary repetition.

EXCERPTS FROM THE BRIEF OF NORMAN GRADSKY APPEARING AS POINT V.

POINT V.

THE COURT ERRED IN ALLOWING TESTIMONY THAT APPELLANT HAD ADVISED A WITNESS TO TAKE THE "FIFTH AMENDMENT" AND IN NOT INSTRUCTING THE JURY THAT SUCH ACTION DID NOT CONSTITUTE ADMISSION OF GUILT.

HARRY HICKS testified that he participated in preparing fraudulent instruments which were discounted with Inter-City (T 334). He also testified that appellants told him to "take the fifth" in the Courthouse hallway. (T 339)

This testimony was obviously offered for the purpose of showing an admission by NORMAN and LEON GRADSKY that they had something to fear from HICKS' testimony and,

therefore, was to be construed as an admission of guilt by appellants.

Although this testimony was not objected to at the trial, admission of this testimony was clearly a defect affecting appellant's substantial rights—the right to a fair trial. This Court, therefore, has jurisdiction under Rule 52 (b) of the Federal Rules of Criminal Procedure to remedy this defect.

The Supreme Court in *Grunewald* v. *United States*, 353 U. S. 391 (1957) said, at 424:

> "The danger that the Jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in the light of contemporary history, far from negligible."

In the case at bar, the only inference the Jury could be asked to draw from the exchange in the hallway was advising a person to exercise his constitutional privilege was tantamount to an admission of guilt.

Allowing such testimony in for purposes of drawing prejudicial inferences prevented appellants from having a fair trial.

Here, the Judge should have acted promptly either to exclude the prejudicial testimony, *Beck* v. *Wings Field, Inc.*, 122 F. 2d, 114 (1941), or should have given sufficient instructions as to the inferences which could properly be drawn from the testimony. The fact that no objection was raised by counsel to either the testimony or the lack of protective instruction in no way should be considered as waiving such a patent and substantive error.

EXCERPTS FROM THE BRIEF OF THE UNITED STATES GOVERNMENT

Page 10–

During the period from December, 1958 to March, 1959 when National was receiving substantial sums from Miracle,

National diverted a total of $47,050 to Leon Gradsky by means of checks drawn to L. G. Enterprises which were endorsed by Leon Gradsky and checks drawn to "Leon Herman" which was an alias used by Leon Gradsky (Tr. 667-668).[4] Leon Gradsky also received a total of $21,703 directly from Inter-City substantially as purported salaries or loans (Tr. 668-669).

Page 10—Footnote 4

Appellant Leon Gradsky objects to the testimony of his use of the name "Leon Herman". There was no objection to this testimony at trial nor was it contradicted. (Tr. 667). Exhibit 65, being the record of "Leon Herman's" account at the Miami National Bank, gives his address as 4 So. Shore Drive, Miami Beach, Florida. That was also the address of L. G. Enterprises as stated on Exhibits 30 and 64. Casual comparison of Leon Gradsky's signatures on those two exhibits with the signature of "Leon Herman" on Exhibit 65 further confirms Mr. Callahan's testimony.

Pages 26-28

Both appellants urge that the trial court erred in not excluding the testimony of Harry Hicks that Leon Gradsky told him to "take the Fifth" during a conversation in the courthouse. Appellants argue in the alternative that the trial court erred in not instructing the jury that Leon Gradsky's statement did not constitute an admission of guilt (N. G. Br. 13-15, L. G. Br. 21).

The relevant portion of Harry Hicks's testimony is as follows (Tr. 339-340):

> "Q. Calling your attention to a few days ago, did you have any conversation with Mr. Norman or Leon Gradsky?
>
> A. It wasn't a conversation. I passed by Mr. Leon Gradsky. He says, 'Take the Fifth'.
>
> Q. Where was this?
>
> A. In the hallway.
>
> Q. In this courthouse?
>
> A. Yes, sir.

Q. Who else was present?
A. Mr. Norman Gradsky.
Q. Did he say anything?
A. He said, 'They have 140 deals against you.'
Q. Who said that?
A. Mr. Norman Gradsky."

Appellants allowed this relatively protracted exchange to continue without raising a voice in objection. This is one of the many instances where appellants ignored ample opportunity to give the trial court occasion to consider the supposed errors on the basis of which they now ask this Court to upset the trial and their convictions. Especially pertinent to this maneuver is the court's statement in *United States* v. *Agueci*, 310 F. 2d 817, 840 (C. A. 2, 1962):

> "But, no objection was made during the course of the questioning and, especially in the absence of any significant showing of prejudice, we feel that the appellant should be precluded from raising this issue for the first time on appeal. 'The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create.' United States v. Five Cases, 179 F. 2d 519, 523 (2d Cir.), cert. denied, 339 U. S. 963, 70 S. Ct. 997, 94 L. Ed. 1372 (1950)."

Appellants have failed to show that admission of the statement would even have been error in the face of timely objection. Hick's testimony was neither hearsay, irrelevant nor immaterial. It certainly was competent evidence that Leon Gradsky had been aware of the preparation of the fictitious finance paper. The cases to the effect that inferences of guilt may not be drawn from personal invocation of the Fifth Amendment are inappropriate here, as Leon Gradsky was not asserting the Fifth Amendment.

APPENDIX E

CHARGE OF THE COURT

Lady and gentlemen of the jury, you have heard the evidence and the arguments of counsel and the time has come to instruct you as to the law which governs this case, and although you as jurors are the sole judges of the facts, you are duty-bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out any one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given to you in the instructions of this Court.

Unless otherwise indicated, each instruction given should be considered by you as referring separately and individually to each defendant on trial.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the not guilty plea of each of the accused.

Now, you are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence and follow the law as stated by the Court and reach a just verdict regardless of consequences.

The indictment itself is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense and, of course,

if he is found guilty, it is not to be because of the indictment but because of the evidence.

One type of evidence is direct evidence, such as the testimony of an eye witness or somebody who overheard a conversation. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of an offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact.

When the attorneys on both sides stipulate or agree to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proven. As I recall, one or two minor facts were stipulated to in this case.

The evidence in a case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, and all those exhibits are available to you if you want any or all of them, and they will be brought to the jury room for your examination merely upon your requesting the marshal so to do.

Any evidence as to which an objection was sustained by the Court and any evidence ordered stricken by the Court must be entirely disregarded. You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find to have been proven such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which reason and common sense leads the jury to draw from the facts which have been proven. There has been a very considerable discussion of the indictment in this case and it is probably not neces-

sary to further talk to you about it, because I think you are fully aware of what the indictment charges.

It consists of eleven counts and each count, of course, stands on its own bottom. It is like eleven charges have been made and, as I will instruct you, they are to be considered separately as to each defendant and the evidence will be weighed as against the charges to determine the guilt or innocence of the defendants.

Perhaps it will not be amiss to briefly mention the counts charged without going into the details.

Count 1 charges that prior to April 16, 1958 and continuing until June 30, 1959, Miss Eizenman, Mrs. Lemlich, Leon Gradsky, Norman Gradsky and Norman Herman—and the only ones you are considering here are Leon Gradsky and Norman Gradsky—did unlawfully, wilfully and knowingly directly and indirectly in the offer and sale of securities; namely, promissory notes of Inter-City Finance Corporation, employ a device, scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading. In other words, they are charged with making untrue statements of material facts to mislead and to hold back facts intending thereby to deceive, by withholding of facts which should have been made in order to make their other statements not misleading and to engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon the purchasers of said securities. Then they name a number of purchasers including the witnesses who have appeared stating that they made purchases, and others.

Then it goes on to say that on April 16, 1958, they organized this company, Inter-City Finance Corporation and that Leon Gradsky would be the manager and that he would offer for sale and sell the one-year promissory notes bearing 12 and 15 per cent interest as hereinafter described. That the defendant Eizenman would be the president and she would and did offer for sale and sell Inter-City notes and the others did

act in various capacities not important here except to further charge the defendant, Norman Gradsky would not be an officer of Inter-City but he would and did take an active part in its organization and promotion and management.

Then it goes on to say that at all times material herein the defendants would, did, dominate, control, aid, abet, counsel and direct the affairs of Inter-City and to finance Inter-City and to raise funds allegedly to be loaned to customers at high rates of interest, the defendants would and did offer for sale and cause to be offered for sale and sold to investors said Inter-City notes by means of newspaper advertisements, correspondence, brochures, financial statements, telephone conversations and personal interviews with investors.

And it goes on and charges that the defendants would and did operate Inter-City for the purpose of defrauding investors by selling them said Inter-City notes and obtaining from them moneys which the defendants would and did appropriate for their own use, benefit and enrichment.

And then it goes on to say that the defendants would and did thereafter abandon and dispose of Inter-City leaving it with no assets with which to redeem the notes.

At this point the success or failure of Inter-City is not directly involved. It may be an incident or circumstance, but that is not directly involved in this particular matter.

Then it goes on to say that on or about May 1, 1958, that they organized the Miracle Loan Company with its principal place of business in Vero Beach, Florida to engage in the small loan business and that Eizenman would be the president and she did serve in this capacity and although Norman Gradsky and Leon Gradsky would not be officers of Miracle, they would and did take active part in its organization, promotion, operation and management. At all times material herein the defendants would and did dominate, control, aid, abet, counsel and direct the affairs of Miracle.

The defendants would and did operate Miracle for the purpose of defrauding and deceiving investors and obtaining

from Inter-City for the defendants' own use benefit and enrichment moneys which Inter-City received from the sales of its said notes to investors, and that the defendants would and did cause Inter-City to advance said moneys to National Auto Brokers, a corporation owned, dominated and controlled by Norman Gradsky and to the defendant, Norman Gradsky in the guise of consumer loans allegedly made by Miracle to purchasers of automobiles from National when, as the defendants at all times herein alleged, well knew that said consumer loans were shams and the alleged borrowers from Miracle were fictitious persons and/or extremely poor credit risks to whom National sold automobiles of a value far less than the amounts of the purported loans. The said moneys transferred from Inter-City through Miracle to National and the defendant, Norman Gradsky, were withdrawn, appropriated, converted and embezzled by the defendants for their own use, benefit and enrichment.

And then it goes on and says that they published financial statements to induce purchasers to buy notes and they represented that they had earnings when they had none and they represented that good collateral would be given to the purchasers, which was untrue. The collateral which they did give was worthless, uncollectible and fictitious. And that they did maintain inaccurate and incomplete books for the purpose of deceiving, and that by advertising and letters they made fraudulent statements to deceive, to-wit, that they would receive 36 per cent interest. That the notes were secured by 125 per cent of collateral, that there was no way for the investors to lose. That Inter-City had been in business for four years and that the investments would be safe. That the investors would receive interest and the return of their investments at the end of 364 days and that the collateral was collectible and that Inter-City was doing a wonderful business, prospering and operating at a profit.

That Inter-City owned a Gulf Service Station located in downtown Miami.

That Inter-City was supervised in its operations by the Florida Securities Commission and periodically inspected by that agency.

That they concealed the true facts of their business, that the money they did receive was used to pay interest and not earnings, used in part to pay interest and it was not from earnings, that the moneys in part were being appropriated and embezzled and being converted to the defendants, that Inter-City was insolvent during the period of these sales and that it was continuously suffering operating losses.

Now, those are numerous charges. Of course, basically, I will come to what they have to prove, but these are just charges which may to your satisfaction have been proven and some may not, but it is for your consideration.

Then it goes on to say that on the 29th of September, 1958 Ray Eizenman, Leon Gradsky, Norman Gradsky and Norman Herman sold notes to L. M. Wible who testified, if you remember, and made some or all of these fraudulent statements which have been described in so doing and they used the mails in that on the 29th of September, 1958 in the Southern District of Florida, the defendants wilfully and knowingly caused to be delivered by United States Mails, addressed a letter enclosed in an envelope addressed to L. M. Wible, Mt. Dora, Florida. I believe that letter was introduced at the first of the trial or near the first of the trial.

Now, count 2 is an identical count, except it concerns itself with a transaction on or about the 22nd of May, 1959, and a sale made to A. M. Shearer, and the mailing of a letter on May 22, 1959 in connection with that sale.

Count 3 is identical except it concerns itself with a transaction on or about the 2nd of April, 1959, and the sale to one Joseph E. Haley and the mailing of a letter on that same day to Joseph E. Haley in connection with the sale.

Count 4 is identical except it concerns itself with a transaction on or about the 11th of December, 1958 involving a sale to one George Mikitas and a mailing of a letter to George

Mikitas on or about the 11th day of December, 1958 in connection with the sale.

Count 5 is identical except it concerns itself with a transaction on December 4, 1958, which was a sale to Ralph G. Goberna and the mailing of a letter to him on or about December 4, 1958 in connection with the sale.

Briefly stated, those five counts charge a violation of the Securities Act and roughly stated, it says that they used one or more of these fraudulent statements to effect the sale and they did it wilfully with wilful fraud on their part to these several individuals, the five in number; and that they mailed letters as part of the transaction to the individuals in consummation and as part of the sale itself.

The Securities Act will be further explained to you later on.

Now, count 6 starts another transaction. Count 6 realleges all the matters contained in the first count except the mailing described in paragraph 15 of that first count and says that the defendants for the purpose of executing the aforesaid scheme and artifice and attempting so to do and in furtherance thereof wilfully and knowingly caused to be placed in an authorized depository for mail matter, a letter enclosed in an envelope addressed to Luke A. McGinn, 1628 N. E. 3rd Avenue, Fort Lauderdale to be sent and delivered by the Post Office establishment of the United States.

Briefly, that is the charge that they made fraudulent representations to induce the sale and to obtain this money from a purchaser and in connection therewith they mailed this letter in the Post Office and it was delivered by the Post Office as part and parcel of that sale transaction.

Count 7 is identical except the date is the 3rd day of March, 1959 and the letter itself was alleged to have been sent to Harry C. Ballem, 164 N. E. 30th Street, Miami 37 Florida.

Count 8 is identical except it is stated the date in that case was April 21, 1959. The letter was addressed to Mrs. R. M.

Alford, 312 N. E. 90th Street, Miami, Florida, and it was delivered to her.

Count No. 9 is identical except the date alleged is 20th of May, 1959 and the letter is alleged to have been sent to Mr. Carl R. Morgan, Post Office Box 421, Shenandoah Station, Miami 45, Florida.

Count 10 is identical except the date and that date is alleged to have been October 27, 1958, and the letter is alleged to have been addressed to Mr. George F. Braun, 436 S. W. 13th Street, Pompano Beach, Florida, sent through the Post Office and delivered by them.

Now, Count 11 is different. Count 11 is what we call a conspiracy count, and I will define conspiracy a little later.

It alleges prior to April 16, 1958 and continuing to June 30, 1959, and keep in mind those dates because anything substantially before April 16th or anything beyond June 30 would not be involved in this litigation. These defendants and others, that is, Eizenman, Gradsky, Gradsky and Herman did in the Southern District of Florida and various other places, unlawfully, wilfully and knowingly conspire, combine, confederate and agree among themselves and with each other to commit certain offenses against the United States, to wilfully violate Section 77 (q) (A) Title 15, United States Code and Section 1341 Title 18 United States Code, and among such violations to commit the diverse offenses charged against the said defendants in counts 1 through 10 inclusive of this indictment which we just discussed, and they incorporate the allegations of those counts in this count, and they did in such connection commit one or more of the following overt acts.

In November, 1958, Ray Eizenman sold to Samuel Durbin two notes of Inter-City Finance Corporation.

In June, 1958, Leon Gradsky sold a note of Inter-City Finance Corporation to George C. Anderson.

In May, 1958, Ray Eizenman and Norman Gradsky caused Miracle Loan Company to be organized.

In 1959 Norman Herman directed Gertrude Quasha to sign his name to Inter-City Finance Corporation form letters. Those are what you call overt acts, and one or more of those would have to be established before you could convict under the so-called conspiracy charge.

Now, coming back to some of the details of these charges and the law that covers them:

The law presumes each of the defendants to be innocent of a crime and thus a defendant although accused begins the trial with a clean slate and no evidence against him, and the law permits nothing but legal evidence to be presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendants' guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence.

It is rarely possible to prove anything to an absolute certainty, but it is necessary that proof be submitted to establish each element of the alleged crime beyond a reasonable doubt.

Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs, but it must be evidence, and a defendant is not to be convicted on any mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence if there be a lack of evidence.

Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, and we will talk about elements later, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also

rely upon evidence brought out by cross examination of witnesses for the prosecution.

The law does not impose upon a defendant the duty of producing any evidence, nor does the law impose upon a defendant the duty to take the stand and testify in his own behalf. He may rely as I have stated, upon the weakness of the Government's case, if there be any weakness, or he assumes there is, and the mere fact that he did not take the stand is not to be taken against him in any fashion, because it is his right to take the stand or not to take the stand, as he sees fit, considering the nature of the case.

A reasonable doubt exists in any case when, after a careful and impartial consideration of all the evidence the jurors are not convinced to a moral certainty that the defendant is guilty of the charge.

If they are convinced to a moral certainty, of course, then the doubt would no longer exist.

Now, the law of the United States permits judges to comment to the jury on the evidence in the case, but such comments are only expressions of the judge's opinion as to the facts and the jury may disregard them entirely if they see fit so to do, since they, the jurors, are the sole judges of the facts.

I may have commented somewhere in this case, but I do not recall. I very often do make some comment but certainly it was not intended to be a comment to direct you in any way, shape or fashion as to the weight that you are to give to any evidence in this case.

During the course of this trial I occasionally asked questions of a witness in order to bring out facts not then fully covered by the testimony. Do not assume that I hold any opinion on the matters to which the questions were related. Remember that at all times you as jurors are at liberty to disregard all comments of the Court in arriving at your own findings of the facts, but, of course, where I ask questions and answers were given, you must weigh those answers along with the other evidence in arriving at your verdict.

It is the duty of the attorneys on each side of the case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. When the Court has sustained an objection to a question, the jurors are to disregard the question and may draw no inference from the wording or speculate as to what the witness would have stated if permitted to answer. Also disregard any answer given to any question to which an objection was sustained and also disregard all evidence that was stricken on the motion of any counsel. Sometimes a witness will answer before the objection is ruled on. If he did, just disregard his answer, if I sustained the objection.

In allowing testimony or other evidence to be introduced over an objection of counsel, the Court does not, unless it is expressly stated, indicate any opinion as to the weight or effect that is to be given to that evidence, so allowed.

You are the sole judges of the credibility of the witnesses and the weight and effect of all the evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience has become an expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed, and which is material to the case, and he may also state the reasons for his opinions. You should consider each expert opinion received in evidence in this case and give is such weight as you think it deserves, and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound or insufficient. We had an expert on handwriting, we had experts on accounting, and as I recall, they were the only experts we had in this particular case.

The indictment charges violations of three statutes of the United States Code, the Mail Fraud Statute, the Securities Act of 1933 and the Conspiracy Statute. In this connection I instruct you that the indictment is not evidence in any sense, but a mere accusation and it is incumbent upon the Government to sustain each and every charge in the indictment and every material

part of that charge by a proper measure of proof, that is, beyond a reasonable doubt.

I have told you what the indictment charges, and I will not repeat that.

A separate offense is charged in each count of the indictment, each of the eleven counts. Each offense and the evidence applicable thereto should be considered separately as respects to each of the defendants.

You, by your verdict, will enter the words "guilty" or "not guilty" as respects to each count and as respects to each defendant, basing your verdict upon the evidence before you.

Forms of verdict have been prepared and they are self-explanatory. When you retire, you will select one of your members to be foreman and that foreman will deal with me in all matters that need to be dealt with up until the time your verdicts have been received and filed.

That foreman will also fill out your verdict when you arrive at a verdict as respects to each count, inserting the words "guilty" or "not guilty," as the case may be, in the appropriate line. He will also date the verdict and he will also sign the verdict when it is returned.

In arriving at a verdict it must be the verdict of each of you; that is, a verdict of each of the twelve of you.

Now, the first five counts are the securities counts. Section 17 (a) of the Securities Act of 1933, 15 U. S. Code, 77Q (a) provides that it shall be unlawful for any person in the sale of any securities by the use of the mails directly or indirectly to employ any device, scheme or artifice to defraud.

You are instructed that the offense defined by this Act as applicable to this case consists of three elements and each of these elements must be established beyond a reasonable doubt before you can convict on any of the securities counts.

(1) That the defendants wilfully and intentionally employed a device, scheme or artifice to defraud as charged in the indictment, that is, charged in the count under consideration.

(2) That the device, scheme or artifice to defraud was employed in the sale of securities. As a matter of law, these notes which Inter-City sold, of course, were securities, and that is the charge that they were sold inviolation of this Act.

(3) That the defendants directly or indirectly used the mails in furtherance of the device, scheme or artifice to defraud.

To come within the prohibition of Section 17 (a) of the Securities Act the provision involved in Counts 1, 2, 3, 4 and 5, that is, the securities charges, it is only necessary that the mails be used in the employment of a scheme wilfully to defraud involving a sale of securities. It is not necessary that either the alleged fraud or the sale be actually effected by such use of the mails, but merely that they be employed.

Now we come to the mail fraud count which you will recall follow the securities counts.

The mail fraud statute provides in pertinent parts as follows:

"Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises so to do, places in any post office or authorized depository for mail matter any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing shall be," punished, and so forth.

In other words, if you used or caused to be used the mails by depositing something, any such matter or thing, in a device to defraud people of property or money, then the statute may apply, providing those allegations are established beyond a reasonable doubt.

You are instructed that the offense defined by the statute as applicable to this case consists of two elements (1)—and each of these elements has to be established as respects to each

count before you could convict, that the defendants devised a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises as charged in the indictment; and

(2) That for the purpose of executing such scheme they placed or caused to be placed any matter or thing in any post office or authorized depository for mail matter to be sent or delivered by the Post Office Department or knowingly caused such matter or thing to be delivered by mail.

It is not necessary that mail matter under such charges, if they be otherwise established, be mailed by the defendants charged personally. The act of mailing may be performed by a perfectly innocent agent. Where one does act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can be reasonably forseen even though not actually intended, then he causes the mails to be used. It is upon this definition that you are to determine whether the defendants caused the mails to be used as charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the indictment.

You will remember mails were involved in the security count as well as the mail fraud count, or the first ten counts.

Now, the eleventh count is the conspiracy count and a conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of partnership in criminal purposes in which each member becomes the agent of each other member. The gist of the offense is a combination or agreement on the part of each of them to violate or disregard the laws of the United States of America named and described in the indictment in the several counts.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy does not thereby become a conspirator.

Before a jury may find a defendant or any other person has become a member of a conspiracy the evidence must show that the conspiracy was formed and that each defendant under consideration or other person who is claimed to have been a member knowingly and wilfully participated in the unlawful plan charged with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some act which the law forbids or with specific intent to fail to do some act the law requires to be done. That is to say, to participate with bad purpose either to disobey or disregard the law. So if a defendant or any other person with understanding of the unlawful character of a plan intentionally and actively encourages, advises or assists for the purpose of furthering the undertaking or scheme he then and thereby becomes a knowing and wilful participant; namely, a conspirator.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the original instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say the membership of a defendant or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did, so in a case where the evidence shows, if it does so show, a common plan or arrangement between two or more persons evidence as to the act done or statement made by one is admissible against all, provided the acts be knowingly done and the statement be knowingly made during the continuance of the arrangement between them; that is, during the continuance of the conspiracy and in furtherance of the object or purpose of the common plan.

In order to establish proof that a common plan or arrangement existed, the evidence must show that the parties to the plan in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to

accomplish some common purpose or object which is forbidden by law.

In order to establish proof that a defendant or any other person was a party to or a member of some common plan or arrangement, the evidence must show that the plan was formed and that the defendant or other person who is claimed to have been a member knowingly participated in the plan with the intent to advance or further some object or purpose of the plan.

If and when it appears, if it does appear from the evidence, that a common plan did exist and that the defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such common plan and in furtherance of the object or the purpose of the plan.

Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any other person who was not present and heard the statement made.

In other words, briefly stated, if a conspiracy is established and if the identity of the conspirator is established and then thereafter during the continuance of that conspiracy anything done or said by one of the conspirators may be received in evidence against all of them.

The law also provides that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever wilfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States is punishable as a principal."

I have charged you, I think, before that each of these elements in these offenses has to be established separately by evi-

dence showing the existance beyond a reasonable doubt that one of the elements in each of these cases is the element of intent in the mind of the defendant under consideration. "Intent" of course is used in its common sense.

In determining the issue as to intent, the jury are entitled to consider any statements made and acts done or omitted by the accused and all facts and circumstances in evidence which may aid determination of the state of mind. Naturally, state of mind can only be proved by indirection; that is, by circumstances, because one cannot look in one's mind. Most often there are no statements as to intent directly but merely acts and statements bearing upon intent, if there be any such acts.

Now, in order to establish conspiracy beyond a reasonable doubt, it must be established first that the conspiracy described was formed and existing at or about the time alleged. Second, that the accused knowingly and wilfully became a member of the conspiracy. Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged. You will remember there were three charges in the indictment and I read those three. And perhaps I should read them again to you because it is pretty hard to remember them. Overt acts are not crimes in themselves necessarily. They are just acts done in connection with the alleged conspiracy or alleged to have been done.

Now, the overt acts in this case charge that in November, 1958, Ray Eizenman sold to Samuel Durbin two notes of Inter-City Finance Corporation.

(2) In 1958, Leon Gradsky sold a note of Inter-City Finance Corporation to George C. Anderson.

(3) In May, 1958, Ray Eizenman and Norman Gradsky caused Miracle Loan to be organized.

(4) In 1959 Norman Herman directed Gertrude Quasha to sign his name to Inter-City Finance Corporation's form letters.

Now one of those so-called overt acts, one or more would have to be established beyond a reasonable doubt before you could find the defendant under consideration guilty of the conspiracy count which is count 11.

That such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

If you find from the evidence beyond a reasonable doubt that existence of the conspiracy charged in the indictment has been proved and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete and it is complete as to every person found by you to have been knowingly and wilfully a member of the conspiracy at the time the overt act was committed regardless of which of the conspirators did or accomplish the overt act.

Intent to defraud is the essence of the offense charged in each of the first ten counts of the indictment.

However, the evidence need not show that the United States or anyone was actually defrauded but only that the accused acted with the intent to defraud.

To act with intent to defraud means to act with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self.

The law as respects to these charges contained in these eleven counts was not violated if the statements written or oral charged to have been made in the evidence were not false at the time of the making or mailing.

In other words, it is the time of their activity that the proof must show that the statements or letters or whatever they were were, in fact, false.

The letter mailed need not itself disclose any intent to defraud or show on its face that it was mailed in furtherance of a scheme to defraud, but it is necessary in order to establish proof of the offense charged that the evidence show beyond

a reasonable doubt that the letter was wilfully mailed or caused to be mailed for the purpose and with the intention of executing or carrying out the scheme to defraud alleged in the indictment or some part of that scheme.

Now, you as jurors are the sole judges of the credibility of the witnesses and the weight their testimony severally deserves. A witness is presumed to speak the truth but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence, if there be contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief.

Consider each witness' intelligence, motive, state of mind and demeanor and manner while on the stand. Consider also any relation which each witness may bear to either side, if they bear any relation, the manner in which each witness might be affected, if he would be affected, by the verdict and the extent to which, if at all, each witness is supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, if one exists, consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or wilful falsehood.

If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, that you think it may deserve.

All evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavor-

able to the accused should be considered with caution and weighed with great care.

In other words, if a witness is shown to be hostile to the accused, if there were any so shown, then you would weigh the testimony of that witness with great care.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars, and you may reject all the testimony of that witness or give is such credibility as you may think it deserves.

Finally, the Government has the burden of proving its case, not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence.

In other words, prove it beyond a reasonable doubt, and I have already instructed you in some detail as to what that proof consists of.

Have I ommitted any instruction, gentlemen, that you submitted?

MR. BATES: No, sir.

MR. GELB: No, sir.

MR. MADSEN: No, sir.

THE COURT: Do you desire a further conference on instructions?

MR. MADSEN: I would like to make one suggestion, your Honor.

THE COURT: All right. Come up here.

(Thereupon counsel approached the Bench out of the hearing of the jury.)

THE COURT: I believe I indicated that Mr. Wible appeared. He is the person named in that first count. I think

his letter was introduced, but he did not appear personally. As to the others, I may have mentioned, they appeared, but you will have to use your own memory.

Any other matters that need to be discussed?

MR. BATES: No, your Honor.

MR. MADSEN: No, sir.

MR. BELB: No, sir.